Filed 10/24/12 In re E.F. CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| In re E.F., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>E.F.,<br><br>Defendant and Appellant. | G045678<br><br>(Super. Ct. No. DL040292)<br><br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Jacki C. Brown, Judge. Affirmed as modified.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

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A juvenile court sustained a Welfare and Institutions Code section 602 petition filed against defendant E.F.,[1] who was a minor at the time of the conduct at issue in this case. The court found that defendant committed each of the four counts alleged against him: (1) sexual penetration by foreign object of an unconscious person (Pen. Code, § 289, subd. (d));[2] (2) sexual penetration by intoxicating substance (§ 289, subd. (e)); (3) sexual penetration by foreign object of a minor (§ 289, subd. (h)); and (4) distribution of obscene matter (§ 311.1). The court declared defendant to be a ward of the court and sentenced him to time served in juvenile hall of 86 days and probation.

This case arose after a May 2011 incident in a hotel room following the senior prom at defendant's high school. Victim Jane Doe was unconscious in a bed when defendant and another minor (B.E.) placed two foreign objects between Jane Doe's exposed buttocks and took a photograph, which was then transmitted to Jane Doe and other individuals. Defendant's contentions on appeal are primarily based on the claim that there is insufficient evidence in the record to support the court's presumed finding (necessary to defendant's convictions under § 289) that the foreign objects actually penetrated Jane Doe's anus. But a reasonable finder of fact reviewing the testimony and

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1 In an attempt to protect the privacy rights of the victim and the other minors involved in this case, we shall eschew all references to the first or last names of defendant, his codefendant, the victim, and all witnesses. We shall instead utilize abbreviations. We will also avoid the recitation of unnecessary factual details that might aid in linking this case to the individuals involved.

2 All statutory references are to the Penal Code, unless otherwise stated.

exhibits in this record, in particular the photograph of Jane Doe's buttocks that was distributed by defendant, could conclude the foreign objects penetrated Jane Doe's anus. Thus, although we modify defendant's probation conditions, we otherwise affirm the judgment.

## FACTS

We review pertinent testimony and other evidence in some detail due to the nature of the claims made on appeal. We exclude discussion of witnesses who provided duplicative testimony or evidence that does not bear on the issues presented on appeal. Neither defendant nor B.E. testified.

*Testimony of Jane Doe*

Jane Doe, 17 at the time of trial and the incident at issue, attended her high school prom in May 2011. Jane Doe attended with her longtime friend and prom date, defendant. Defendant had orchestrated an elaborate presentation to ask Jane Doe to the prom. But there was an understanding (at least from Jane Doe's perspective) that the two were going to the prom as friends, not individuals who were romantically interested in each other. Jane Doe and defendant were part of a larger circle of friends who remained close throughout high school.

Jane Doe met B.E., who attended a different high school, for the first time on the night of the prom. But she knew B.E. was a friend of some of her close friends, including defendant. B.E. was attending Jane Doe's prom as the date of one of her classmates.

Jane Doe and her friends, with the help of a mother of one of the friends, procured a hotel suite to continue the festivities after the end of the prom. The suite featured a common room, a kitchen area, and two bedrooms. At one time or another on

the night of the prom, approximately 11 people were in the suite. Although not part of the group that had procured the hotel suite, B.E. appeared at the hotel party.

The revelers were drinking beer, vodka, and margaritas. Jane Doe consumed six or seven shots of vodka and "a little bit of a margarita." She had "drank in the past a few times but not regularly." Prom night was the most Jane Doe had ever drunk. She was drinking with B.E., who was also consuming shots of vodka.

Jane Doe and B.E. began "making out at one point." Their activities escalated in one of the bedrooms, and Jane Doe and B.E. had sexual intercourse. Jane Doe consented to sexual intercourse, but did not consent to other conduct, such as placing foreign objects inside of her body. Jane Doe was "pretty drunk." She remembers she had sex with B.E., but does not remember any details. She remembers getting dressed afterwards. Jane Doe thinks she "passed out after that." Jane Doe does not think her buttocks were exposed when she passed out on the bed. She did not give anyone permission to pull her pants down.

Jane Doe does not know where defendant was when these events were occurring. Jane Doe had not consented to having sex with defendant and had not agreed to let defendant put any foreign objects into her anus or vagina.

Jane Doe woke up around 11:30 a.m. the next morning. Her buttocks were not exposed. Jane Doe did not feel strange or have a hangover. Jane Doe did not feel any injuries to her body, including her "butt."

Jane Doe checked her cellular phone; she had received a message from defendant with a photograph attached. The photograph (admitted into evidence as exhibit No. 3, which we describe in detail below) depicted Jane Doe and was accompanied by a text message to the effect that defendant had lost all respect for Jane Doe. Defendant did not pick up his cellular phone initially when Jane Doe attempted to contact him, and later hung up on her after saying he did not want to talk to her. Jane Doe thought defendant

was mad because she had sex with B.E. The next day at school, defendant was rude to Jane Doe (he made a "barfing noise" when they encountered one another).

The day after prom, Jane Doe called B.E. and told him not to tell anyone about what occurred the previous night and to delete the photograph. B.E. and Jane Doe were laughing about the photograph. B.E. did not deny he took the photograph; he agreed to delete the photograph. Jane Doe became more and more embarrassed as it became apparent other individuals besides B.E. and defendant had seen the photograph.

*Testimony of K.N.*

K.N., a friend of Jane Doe and defendant, was present at the hotel suite the night of the prom. K.N. described Jane Doe and defendant as "really good friends" but not romantically involved. K.N. confirmed many of the details about the hotel party that were testified to by Jane Doe (e.g., layout of suite, drinking at the party, attendees at the party). The party atmosphere was fluid, in that individuals mingled between different groups and went to different rooms in the suite throughout the night.

K.N. indicated there were two occasions on which security guards came to the suite. On the first occasion, alcohol was confiscated. On the second visit, K.N. and others were trying to get into the bedroom in which Jane Doe and B.E. had locked themselves. When security assisted in demanding entry, Jane Doe was on the bed and did not look coherent. B.E. finally opened the door wearing only "shorts"; he looked upset at the individuals knocking at the door. It was apparent something sexual had happened between Jane Doe and B.E. K.N. thought defendant was upset after this incident; defendant observed to K.N. that he could not believe his friend would do this to defendant. "He wasn't angry. I think he kind of was hurt."

At about 2:30 a.m., K.N. was in a bedroom in which Jane Doe was on the bed. Jane Doe was fully dressed. Jane Doe was not asleep, but could only mumble in response to questions from K.N. Defendant, B.E., and their friend R.C. came into the

room. As the group was talking, B.E. walked up next to Jane Doe and "snapped her thong and her leggings." This action partially exposed Jane Doe's buttocks; K.N. pulled Jane Doe's clothing back up. K.N. yelled at B.E. to stop. K.N. did not notice what defendant or R.C. were doing. After this incident, K.N. and her date left the room, leaving the three males in the room with Jane Doe. K.N. does not know what happened subsequently in the bedroom. K.N. eventually heard about, but did not ever see, the photograph in the record as exhibit No. 3. Defendant did not admit to K.N. that he participated in any way in the conduct depicted in exhibit No. 3.

*Exhibit No. 3*

Exhibit No. 3 was central to the trial and to this appeal. The photograph features a female (Jane Doe according to other evidence) lying on the front and left side of her body. She is wearing a shirt, but her pants are pulled down around her thighs to reveal to the camera her buttocks, her lower back, and the back of her upper thighs. Jane Doe's legs are covered by sheets or blankets and her face cannot be seen. Jane Doe's buttocks are in the center of the photo, and are clearly the focus of the photographer. Neither the anus nor the vagina of Jane Doe is visible in the photograph. Jane Doe's body is positioned such that her left hip is in direct contact with the bedding and her right hip is pointing up and slightly away from the camera. The left buttock, thus, is on the bottom of the photograph while the right buttock is on top.

The two foreign objects at issue (variously described as coffee stirrers or chopsticks) are long, thin, and light-colored. The foreign objects do not look like the small, brightly colored coffee stirrers commonly available at self-serve coffee stations. Instead, they look more like chopsticks with regard to both length (perhaps seven-to-10 inches) and girth. Nonetheless, the exhibit list designates the foreign objects as "coffee stirs," which suggests this is the intended use for the foreign objects. Both a "wrapped" and "unwrapped" set of coffee stirrers were admitted into evidence, but the parties did

not submit these exhibits on appeal. Another object not directly relevant to the charged offense appears in the photograph. It is a dark landline phone handset (the device held to the face to talk and hear) placed next to Jane Doe's buttocks. The phone handset appears at the bottom of the photograph, in the foreground.

The foreign objects are positioned such that they appear to converge at a single point between the buttocks of Jane Doe. The point of convergence is several inches below the top of the gluteal cleft (i.e., the butt crack) and just above the appearance of empty space between the very top of Jane Doe's thighs. In other words, the point of convergence is roughly the anal-genital area. But because the buttocks are not spread apart, it is impossible to directly observe whether the foreign objects penetrate the anus or vagina. It appears that the tips of the foreign objects point upwards into the right buttock rather than going straight into the middle of the gluteal cleft. It also appears that the foreign objects point downward toward the bed, rather than sticking straight out from Jane Doe's body. It is difficult to tell whether or not the foreign objects touch the left (lower) buttock as they come out of the gluteal cleft. The foreign objects emerge from the point of convergence inside the gluteal cleft at an angle (vis-à-vis each other) of approximately 45 degrees. It appears that the opposite ends of the foreign objects rest upon, in one case, bedding of some sort, and, in the other case, the phone handset. The visible portion of one of the foreign objects (the one that touches the phone) appears to be a few inches longer.

*Defendant's Police Interview*

After initially denying during his police interview that he was in the room at all when Jane Doe was photographed, defendant eventually claimed he was in the room when B.E. both placed the foreign objects and took the photograph of Jane Doe. Defendant was asked by an officer whether the sticks were "inside" Jane Doe's "butt." Defendant responded, "sticking out so, I don't know the" and then trailed off.

Questioning continued a page later in the transcript on this point. "[Q:] And where were the sticks? [¶] A: They were in between the cheeks also, like that. [¶] [Q.] Okay. Did you actually see the sticks? [¶] A. They were stuck — I don't know if they were all — [¶] [Q.] Were they actually in her butt hole? [¶] A. — but they were stuck, yeah, and they were — stuck. [¶] [Q.] They were being held there? [¶] A. Yeah." There is no further clarification by defendant of exactly where the foreign objects were placed.

*Police Interview of B.E.*

Defendant and B.E. were tried together. As the attorneys and court emphasized throughout trial, the out-of-court statements of defendant were not admissible against B.E. and vice versa. We note B.E.'s relevant out-of-court statements in his police interview, although these statements were not admissible evidence with regard to defendant. We do so in part because defendant attributes some of B.E.'s statements to himself in his brief. We also do so because B.E.'s statements regarding penetration were admissible against B.E., and the court made consistent implied findings on the question of penetration by finding violations of section 289 by both defendant and B.E.

B.E. claimed defendant put the foreign objects in Jane Doe's butt, but "he didn't like shove them in her butt . . . . He just put them there, and then took the picture." When asked "[h]ow far into her anus did the chopsticks go," B.E. replied: "They weren't . . . in her butt at all. They were just like in her cheeks, sort of, but not in her butthole or anything." When asked to clarify whether the foreign objects were in Jane Doe's "butthole," B.E. responded: "Not, not, not in her butthole, no, no, no." The foreign objects were between the buttocks "[f]or like five seconds, and then I, like, knocked them out, and I, I like, . . . pulled everything up, and we left."

*Testimony of R.C.*

R.C. was hanging out with defendant and B.E. at the hotel party. He noticed both defendant and B.E. were flirting with Jane Doe. Defendant was jealous and angry when B.E. and Jane Doe went into the bedroom together. When the security guards came into the hotel suite to seize the alcohol, Jane Doe came out of the room and attempted to talk to defendant and give him a hug; defendant told her to get away from him.

Later, defendant and B.E. went into a bedroom in which Jane Doe was sleeping. R.C. did not go into the room. Shortly thereafter, R.C. heard defendant and B.E. laughing. R.C. walked into the room to see what they were laughing at and observed Jane Doe on the bed with her pants down. Jane Doe was not awake. R.C. joined defendant and B.E. in laughing at Jane Doe. R.C. went to the restroom. When he returned, defendant and B.E. were laughing and looking at a cellular phone. The cellular phone displayed the picture of Jane Doe admitted into the record as exhibit No. 3. But Jane Doe's body did not have foreign objects in it when R.C. was in the room. B.E. also showed the photograph to a female who subsequently walked into the room; she laughed and thought the photograph was funny. But she pulled up Jane Doe's pants. After they left the room, defendant admitted to R.C. that defendant was the one who placed the foreign objects. B.E. admitted he took the picture. Defendant thought the incident was a funny joke.

*Testimony of S.T.*

S.T. testified that he talked to defendant sometime after the night of the prom. Defendant admitted to S.T. that defendant was in the room and witnessed what occurred. Defendant was in the room when the picture was taken. Defendant saw B.E. place the foreign objects in Jane Doe's buttocks. Defendant told S.T. that defendant saw Jane Doe "clench" in response to the foreign objects. There is no attempt to clarify

whether S.T. had information as to whether this meant Jane Doe clenched her buttocks (voluntarily or involuntarily) in response to foreign objects being placed between her buttocks or in her anus.

## DISCUSSION

Defendant was charged with sexual penetration of Jane Doe with a foreign object, because Jane Doe was: (1) unconscious (§ 289, subd. (d)); (2) intoxicated (§ 289, subd. (e)); and (3) under 18 years of age (§ 289, subd. (h)). "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).) "As with rape and sodomy, a violation of section 289 is 'complete' the instant 'slight' 'penetration' of the proscribed nature occurs." (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) Penetration may be established by circumstantial evidence. (*People v. Adams* (1993) 19 Cal.App.4th 412, 429 [sperm in rectum plus injuries to rectum and anus supported finding of sodomy].)

### *Sufficiency of the Evidence of Penetration*

Defendant first claims there is insufficient evidence in the record to support the court's implicit finding that "penetration" under section 289 was established beyond a reasonable doubt. Neither the parties nor the court seemed to focus extensively on this question at trial. To her credit, the prosecutor directly addressed this issue in her closing argument. She claimed exhibit No. 3, along with defendant's admissions in his police interview about the foreign objects being "stuck" and S.T.'s relaying of defendant's description of Jane Doe as "clenching," established that penetration of the anus occurred. Defendant's counsel did not address the question of penetration in closing argument,

preferring to advance the claim that defendant did not participate in any criminal conduct that may have occurred. And the court did not offer any explanation of its findings with regard to this issue on the record.

We are *not* tasked with deciding whether the foreign objects penetrated Jane Doe's anus. A reviewing court should not "'"ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation omitted.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We resolve this question "'in the light of the *whole record* . . . and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding . . . ." (*Id*. at p. 577.) Substantial evidence is evidence that is "reasonable, credible, and of solid value . . . ." (*Id*. at p. 578.) Reasonable inferences may be made from substantial evidence. But inferences "'"may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

To constitute substantial evidence of a *particular* sex crime, testimony "must describe the *kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy)." (*People v. Jones* (1990) 51 Cal.3d 294, 316; see also *People v. Raley*, *supra*, 2 Cal.4th at pp. 890-891 [although there was clear evidence of a forcible sexual attack of some unspecified kind on a murder victim, her denial in the ambulance that she had been raped and statement about "'fooling around'" was not sufficient to prove specific crime of

forcible oral copulation].) Applying this principle to the issue before us, there needs to be sufficiently specific evidence of penetration to support a conviction under section 289.

It is, to say the least, extremely significant to defendant whether penetration of the anus occurred or if the foreign objects were merely placed in the gluteal cleft.[3] Some of the usual ways of proving penetration could not be utilized in this case. Because she was unconscious during the incident, there is no testimony from Jane Doe suggesting her anus was penetrated. (See *People v. Thomas* (1986) 180 Cal.App.3d 47, 54-56 [victim's testimony that it hurt when a defendant pushed his penis against her anus supports a factual finding of slight penetration].) Nor is there circumstantial evidence suggesting penetration occurred based on the physical condition of Jane Doe's body.

Exhibit No. 3, the photograph depicting the crime at issue, establishes, at a minimum, that the foreign objects were *near* Jane Doe's anus. But exhibit No. 3 does not directly show penetration of the anus. Furthermore, a close analysis of the angle of entry of the foreign objects into the gluteal cleft (from the perspective of the photographer, the only angle we have to view the incident) tends to suggest penetration was not occurring when the photograph was taken. The foreign objects appear to point toward the right buttock side (upper buttock in the photo) of the gluteal cleft rather than the middle of the gluteal cleft. On the other hand, one of the foreign objects appears to be longer than the other, which might support an inference that the "shorter" object was inserted in Jane Doe's anus.

Defendant's statements to the police and S.T.'s testimony about "clenching" are likewise ambiguous. There is no clear admission by defendant of penetration. Instead, based on our review of the audio interview compact disc, defendant

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[3] This is not to say that penetration was required in order to establish that defendant's acts were criminal. Rather, penetration is an important dividing line in distinguishing the relative seriousness of offenses. If penetration did not occur, the evidence might support conviction of a different crime (e.g., lewd act, battery).

and a police officer talk over one another about whether the foreign objects were between the buttocks (cheeks) or in the anus (butt hole). It is unclear whether defendant even heard the officer mention the phrase "butt hole" as he was answering the question of where the foreign objects were. The police did not obtain a clearly responsive answer from defendant to the question of whether the foreign objects were placed in the anus. Likewise, defendant's purported out-of-court statements to S.T. about Jane Doe "clenching" do not provide any clear indication about whether the foreign objects were placed in the gluteal cleft or the anus. Certainly, it is plausible that an unconscious individual (as the court found Jane Doe was) might involuntarily clench her buttocks in response to a foreign object being placed in her anus. But such an individual might also clench her buttocks in response to a foreign object being placed near, but not inside, her anus. Without additional evidence on this point, one is left to speculate as to the reason for the clenching.

So is evidence of penetration reasonable, credible, of solid value, and sufficiently specific? Is it enough to support an inference of guilt that a photograph *clearly* supports a finding that the foreign objects were very close to the anus and *possibly* suggests the objects were in the anus (i.e., exhibit No. 3 by itself)? In other words, could a rational person view exhibit No. 3 by itself as proof beyond a reasonable doubt that penetration occurred? If not, do defendant's admissions amount to something solid enough to put the record over the top of the substantial evidence standard? Does any of the other evidence in the record (Jane Doe denying she felt pain the morning after the incident, B.E.'s denial of any penetration to the extent such statement had any admissible evidentiary value in defendant's case) add context to the question that make the court's finding unreasonable?

This is a solidity of the evidence and a reasonableness of the inferences case, not a case in which we may simply defer to the trial court's credibility findings. We cannot simply say, for instance, that the court was entitled to believe Jane Doe and her

friend K.N. Neither individual provided positive evidence of penetration. Likewise, we cannot alchemize a lack of credibility on the part of defendant and B.E. into substantial evidence of penetration.

We must presume the court believed defendant's admissions to the police and S.T. to be true and further believed the admissions in the sense most favorable to the prosecution. But that still leaves the question of whether defendant's admissions are substantial evidence of penetration, not just placement in the gluteal cleft. As with evidence procured from other sources, defendant's admissions must be sufficiently specific for a rational factfinder to decide both whether his alleged acts were criminal and to classify defendant's acts as a particular crime. For this reason, defendant's admissions, standing alone, would not support the judgment against defendant. His statements are simply too uncertain in meaning for a rational trier of fact to conclude beyond a reasonable doubt that penetration of the anus had occurred.

We ultimately conclude, however, that the court's implied interpretation of exhibit No. 3 supports the judgment. Although circumstantial, there is enough evidence of the foreign objects penetrating the anus. The photograph does not depict the anus, which is hidden behind Jane Doe's buttocks. But both of the foreign objects disappear into the buttocks at a single point that one could reasonably conclude was the anus. One of the objects appears to be longer than the other, suggesting the shorter object could have been inserted (however slightly) into the anus. And when considered specifically in light of the photo, defendant's admissions about the foreign objects being held in place and Jane Doe clenching add some minimal support to an inference that penetration occurred.

*Sufficiency of the Evidence of Requisite Mental State*

To violate section 289, penetration by a foreign object must be "for the purpose of sexual arousal, gratification, or abuse . . . ." (*Id.*, subd. (k)(1).) Defendant

argues there is insufficient evidence he had the requisite mental state for committing an offense under section 289 because there is no evidence defendant was sexually aroused or sexually gratified by his conduct. Although defendant acknowledges the "abuse" prong in section 289, he contends a defendant must have the specific intent to obtain sexual arousal or gratification through the commission of abuse. Defendant acknowledges his argument is dependent on this court disagreeing with prior case law.

Under section 289, "'[t]o "abuse" someone is to hurt them by treating them badly, or to cause pain or injury through mistreatment. When such mistreatment is directed to a victim's sexual or "private" parts, the resulting conduct would certainly be considered sexual abuse.'" (*People v. White* (1986) 179 Cal.App.3d 193, 205 [this "view of the law is correct and that it is the only interpretation of 'sexual abuse' that is reasonable"].) "The term 'abuse' imports an intent to injure or hurt badly, not lewdness. . . . [I]t is the nature of the act that renders the abuse 'sexual' and not the motivations of the perpetrator." (*Id.*, at pp. 205-206; see also *In re Shannon T.* (2006) 144 Cal.App.4th 618, 621-622 [under a different statute using similar language, sexual abuse includes humiliating and intimidating touching of a woman's breast without actual physical injury].)

We agree with the analysis in these cases and decline defendant's invitation to revisit established law. There was certainly substantial evidence that defendant intended to humiliate and degrade Jane Doe when he committed the acts in question. There is substantial evidence that defendant had the specific intent to sexually abuse Jane Doe.

*Sufficiency of the Evidence Regarding Obscenity*

Defendant next claims his conviction under section 311.1 must be reversed because exhibit No. 3 is not "obscene." "Every person who . . . in this state possesses . . . any . . . image . . . with intent to distribute or to exhibit to, or to exchange

with, others, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct . . . shall be punished . . . ." (§ 311.1, subd. (a).) Defendant's argument is explicitly contingent on this court finding that there was no substantial evidence that the foreign objects penetrated Jane Doe's anus. Because we have already concluded substantial evidence supports the finding of penetration, we reject defendant's argument that the record does not support the court's finding of obscenity based on a photograph depicting the penetration of a minor female's anus with foreign objects.

*Probation Conditions*

Finally, defendant challenges various probation conditions imposed on him at his sentencing hearing. Defendant's counsel did not agree with the imposition of certain probation terms, but nothing in the record sets forth his specific objections. With regard to the conditions and defense counsel's objections to the conditions, the court merely observed: "I can understand your . . . hesitation and disagreement, but I do think it actually is going to be for his benefit in the long run." The court agreed to revisit the probation conditions at defendant's "progress review," but there is nothing in the record suggesting the issues raised here have been mooted. We set forth in detail the conditions challenged by defendant.

Listed among various form terms and conditions of probation (including unchallenged conditions prohibiting defendant from using or possessing alcohol and requiring defendant to submit to alcohol and drug testing) was the following clause: "Not to use, subscribe to, or download any sexually explicit content to your personal electronic device." Defendant also signed a one-page form entitled "**COMPUTER and ELECTRONIC STORAGE DEVICE USE AGREEMENT FOR JUVENILE SEX OFFENDER CASES**." This form more specifically addresses limitations on what defendant may not do with electronic devices: "Shall not use any computer for any

purpose which might further sexual activity, such activity includes but is not limited to, the following: intentional possession of sexually explicit material in any form; intentional sexually related 'chats' or e-mail exchange; visiting or joining 'chat rooms' which contain sexually explicit conversations; intentionally visiting or viewing sexually explicit material on web sites; intentionally visiting voyeuristic web sites or 'live cam' web sites that contain nudity or sexually explicit materials; intentionally downloading binary files, UUE files, MIME files, AVI files, MPG files, real player files, digital images in any format, text files or multi-media material that is sexual in nature; or intentionally visiting or subscribing to usegroups, newsgroups, or list servers which focus on or contain sexual content."

Defendant was not ordered to comply with a standard form condition of probation limiting possession of *any* sexually explicit material. Thus, defendant apparently would not violate the conditions of probation by possessing pornographic magazines or engaging in sexually explicit written correspondence. He would violate the conditions of probation by downloading internet pornography or engaging in sexually explicit e-mail correspondence.

The form also requires defendant to make it easier for probation officers to detect any violations of the conditions by defendant: Defendant "[s]hall not alter or destroy records of computer use, including the use of software or functions designed to alter, clean or 'wipe' computer media, block monitoring software, or 'restore' a computer to a previous state." "Shall provide any personal password to the probation officer upon request." "Shall not use any form of encryption, cryptography, steganography, compression, password protected files and/or other methods that might limit access to, or change the appearance of data or images." "Shall be responsible at all times for all material, data, images and information found on your computer, or any of your electronic storage devices."

Defendant takes issue with these conditions and deems them unconstitutional because: (1) the conditions limiting computer activity are facially overbroad and unrelated to his crimes; and (2) the conditions requiring preservation of evidence, on their face, violate defendant's right to due process and against self-incrimination. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 889 [claims that probation conditions are constitutionally overbroad and/or vague may be raised for first time on appeal, so long as they represent pure questions of law].)

The juvenile court may impose "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) Juvenile courts, which fulfill a parental role in some ways, have even broader discretion than that allotted to adult criminal courts in fashioning probation conditions "because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.'" (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

There are limits to a juvenile court's discretion. "A juvenile probation condition is generally valid unless it '"(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality."'" (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 692.) Moreover, "[u]nder the void for vagueness doctrine, based on the due process concept of fair warning, an order '"must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated."' [Citation.] The doctrine invalidates a condition of probation '"'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"'" (*In re Victor L., supra,* 182 Cal.App.4th at p. 910.) "In addition, the overbreadth doctrine requires that conditions of probation that impinge on constitutional rights must be tailored carefully

and reasonably related to the compelling state interest in reformation and rehabilitation." (*Ibid*.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights — bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

The court found defendant penetrated Jane Doe's anus with foreign objects, possessed an obscene photograph of Jane Doe, and distributed the obscene photograph by means of his cellular phone. Contrary to defendant's protestations, the probation conditions imposed are clearly related to defendant's sexual offenses. Under the best interpretation of defendant's behavior, he did not grasp the seriousness of his violation of Jane Doe's person and further failed to understand the pernicious consequences of possessing and transmitting an image of this incident through electronic means. Under a harsher interpretation of defendant's conduct, he fully understood the sense of violation and humiliation that would be suffered by Jane Doe. Either way, defendant's crime is intimately related to sex and technology.

There are some tricky questions of overbreadth (and, relatedly, vagueness, although defendant does not explicitly argue vagueness) inherent in the probation conditions imposed on defendant. The broadly stated substantive probation conditions at issue (defendant "[s]hall not use any computer for any purpose which might further sexual activity" and defendant "[n]ot to use, subscribe to, or download any sexually explicit content to your personal electronic device" ) might be interpreted to encompass a wide variety of activities: (1) engaging in online courtship rituals, such as creating a social media page, joining an online dating site, or communicating (in a non-sexually explicit fashion) with a significant other via e-mail or text message; (2) obtaining educational information about safe sex online or in an electronic book; or (3) downloading romantic music from the computer to further sexual activity with a willing

partner. It is an interesting paradox that defendant is not being ordered to remain celibate (other than the standard expectation that he will follow all laws) or to avoid all sexually explicit materials, but is being told to avoid utilizing a particular means of pursuing these interests.

Given potential constitutional issues apparent on the face of these conditions, we must modify the probation conditions to explicitly insert a knowledge requirement and to otherwise limit the potential for acts that are not directly sexual in nature to be deemed a violation of the probation conditions. (See *People v. Moses* (2011) 199 Cal.App.4th 374, 376-382.) Defendant must have "knowledge" that he is violating his probation conditions. (See, e.g., *In re Sheena K., supra,* 40 Cal.4th at pp. 890-892.) In other words, defendant cannot be deemed to violate his probation conditions unless he is aware that his conduct will be deemed to be a violation. It would also be constitutionally overbroad to bar, for instance, defendant posting a becoming photograph of his face on a social media site page on the theory that he was using a computer for a purpose that might further sexual activity (reminding female friends of his appearance). We therefore will modify the relevant conditions in the disposition below.

We ultimately conclude, however, that the court did not err in exercising its discretion to impose a broad ban on defendant using computer devices for the purpose of directly furthering sexual activity or to review sexually explicit content. The probation conditions are already tailored in two ways that favor defendant. First, defendant may use computers and other devices, just not to further sexual activity. Thus, he may still utilize computers and cellular phones for school, non-sexual social activities, and non-sexually explicit informational purposes. (Compare *In re Stevens* (2004) 119 Cal.App.4th 1228, 1231-1232, 1239 [condition restricting all computer and internet use was overbroad].) Second, defendant is not restricted from engaging in all sexually explicit activities. He may still pursue romantic interests. He may still possess hard copies of pornography. He may still view sexually explicit books and movies. The court

determined it was simply better, for the time being, to preclude defendant from mixing sex and technology, which proved to be a potent brew in this case. Given the broad discretion afforded juvenile courts, we find the line chosen to be defensible. We also note that the court agreed to revisit these terms at future hearings, at which point defendant can specifically seek changes to the breadth of the conditions. The court may well intend to gradually relax defendant's ability to use computers and other devices.

We also approve of defendant being required to provide any passwords to his probation officer and to not take evasive action to hide his computer use. Like testing for alcohol and drugs, these conditions introduce accountability to the probation system. (See *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240 ["the court has the power and responsibility to impose conditions such as drug testing or reporting to the probation department"].) Put simply, because defendant is to be allowed access to computers, his probation officer must be able to confirm defendant is complying with the limits set by the probation conditions. Defendant is not being forced to incriminate himself. Instead, he must submit his computer (if he chooses to use one) for inspection and is prohibited from destroying potential evidence.

Lastly, the following probation condition is invalid: Defendant "[s]hall be responsible at all times for all material, data, images and information found on your computer, or any of your electronic storage devices." It is unclear what this language means, particularly the word "responsible." The plainest interpretation of this language suggests it is not, in fact, a condition. Instead, this is a legal conclusion masquerading as a condition, i.e., defendant is strictly liable for everything in his electronic storage devices regardless of the source of the material or defendant's knowledge that such material is in his devices. This "condition" is constitutionally infirm.

## DISPOSITION

We modify the judgment: (1) by inserting the word "knowingly" to condition No. 9 of the "Sex Offender Additional Terms and Conditions" ("Not to [knowingly] use, subscribe to, or download any sexually explicit content to your personal electronic device"); (2) by inserting the word "knowingly" into the fifth paragraph of the "COMPUTER and ELECTRONIC STORAGE DEVICE USE AGREEMENT FOR JUVENILE SEX OFFENDER CASES" ("Shall not [knowingly] use any computer for any purpose which might further sexual activity"); (3) by striking the words "but is not limited to" from the fifth paragraph of the "COMPUTER and ELECTRONIC STORAGE DEVICE USE AGREEMENT FOR JUVENILE SEX OFFENDER CASES" (". . . such activity includes ~~but is not limited to,~~ the following"); and (4) by striking the following paragraph from the latter document: "~~[s]hall be responsible at all times for all material, data, images and information found on your computer, or any of your electronic storage devices~~." As modified, the judgment is affirmed.

IKOLA, J.

I CONCUR:

O'LEARY, P. J.

MOORE, J., Dissenting.

I respectfully dissent because there is a lack of substantial evidence to support defendant's conviction under either Penal Code[1] sections 289 or 311.1.

The evidence is conflicting regarding who placed the stir sticks, defendant or another person in the room, a male named B.E. There was evidence B.E. was the one who placed the sticks and took the photograph. Not surprisingly, in his statement to the police, B.E. said defendant was the culprit. B.E. denied the sticks were in the anus, and as the majority opinion states: "There was no further clarification by defendant of exactly where the foreign objects were placed." (Maj. opn., *ante*, at p. 8.)

"'Sexual penetration'" is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).) """[I]nferences that are the result of mere speculation or conjecture cannot support a finding""" of substantial evidence. (*People v. Arias* (2011) 193 Cal.App.4th 1428, 1440.)

There is substantial evidence that either defendant or B.E. placed the objects, wherever they were placed. However, there is no evidence they were placed in such a manner as to penetrate Jane Doe's anus. Thus, the only evidence that could arguably support the conclusion the sticks penetrated her anus is the photograph accurately described in the majority opinion. And the photograph does not show her anus. To reach the conclusion the sticks were placed so as to penetrate her anus requires nothing short of speculation, conjecture or guesswork,

[1] All statutory references are to the Penal Code.

which is, of course, prohibited. (*People v. Coddington* (2000) 23 Cal.4th 529, 599 [substantial evidence cannot "'"be based on suspicion alone or imagination, speculation, supposition, surmise, conjecture, or guess work"'"], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Neither is there any evidence at all the stir sticks were placed for the "purpose of sexual arousal, gratification, or abuse" as required by section 289. It was treated as a joke. A witness testified defendant and B.E. were laughing while looking at a cellular phone with the picture. Another female walked into the room and also laughed when she looked at the photo. When B.E. showed the photo to Jane Doe, she laughed. Even during the conversation when Jane Doe told B.E. to delete the photograph and not to tell people they had sex, the two laughed about it.

I also find the evidence does not support defendant's conviction for violating section 311.1. Pertinent to the facts of this case, that section prohibits a person from possessing, distributing, or exhibiting to others "any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4." (§ 311.1, subd. (a).) Section 311.4, subdivision (d)(1) defines sexual conduct as "any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, *penetration of the* vagina or *rectum by any object in a lewd or lascivious manner*, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer . . . ." (Italics added.)

Just as the photograph does not constitute substantial evidence Jane Doe's anus was penetrated by the stir sticks for purposes of section 289, neither does the photograph constitute substantial evidence her rectum — that portion of the alimentary canal between the sigmoid flexure of the colon and the anus (see

Webster's 3d New Internat. Dict. (1993) p. 1900; Gray's Anatomy (38th ed. 1995) p. 1920 [after entry into the anal orifice and the anal canal lies the rectum]) — was penetrated by an object in a lewd or lascivious manner. Thus, while section 289 may be violated by "'penetration, *however slight*' of 'genital or anal openings' with a 'foreign object'" (*People v. Martinez* (1995) 11 Cal.4th 434, 443, fn. 6, italics added) the slightest penetration of the anus does not equate to a penetration of the rectum, the area above the anus and the anal canal.

Relevant to this case, section 311.1 prohibits possessing or exhibiting a photograph of a minor involved in sexual conduct which includes penetration of the "rectum." (§ 311.4, subd. (d)(1).) If the Legislature intended to prohibit the possession or exhibition of a photograph depicting (or simulating) the minimal act violative of section 289 — i.e., slight penetration of the anus — the Legislature could have used the same phrase it used in section 289. It chose not to do so. "In using two . . . different terms . . . the Legislature presumably intended to refer to two distinct concepts." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55.) This is especially true when the different language is used in statutory provisions addressing the same or related subjects. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717.) Therefore, the minimal penetration of the anus sufficient to sustain a conviction for a violation of section 289 does not mean a photograph of the same act involving a minor victim qualifies as sexual conduct prohibited by section 311.1.

A similar result would appear to be compelled in situations where the alleged violation of section 289 consists of the penetration of a female's genital opening. In such a case the defendant violates section 289 by the slightest penetration, not of the vagina, but of the labia majora. (*People v. Quintana* (2001)

89 Cal.App.4th 1362, 1364) However, section 311.1 demands more: penetration of the vagina. (§ 311.4, subd. (d)(1).)

That does not end the inquiry, because section 311.1 applies not only to photographs of a minor engaging in the specifically defined sexual conduct, the statute also applies to a photograph of a minor *simulating* the same sexual conduct. "An act is simulated when it gives the appearance of being sexual conduct." (§ 311.4, subd. (d)(1).)

Even were I to assume the photograph was a simulation of the penetration of Jane Doe's rectum, I would still find the evidence lacking because it was quite clear the purpose of the photograph was *not* to sexually stimulate the viewer, as required by the statute. The purpose of the photograph was to amuse the viewer, albeit at Jane Doe's expense. There is no evidence the photograph was intended to sexually stimulate the viewer. As a result, the conviction for violation of section 311.1 is not supported by the evidence.

What defendant and B.E. did, whatever it was, was stupid. It was juvenile. It was disgusting. It was not a violation of either section 289 or 311.1.

MOORE, J.